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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Appellant,

v.

CARL LAFAYETTE LOMAX,

Defendant and Appellant.

F058346

(Super. Ct. No. BF123002A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Jerold L. Turner, Judge.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Appellant.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

STATEMENT OF THE CASE

On June 17, 2008, the Kern County District Attorney filed an information in superior court charging defendant Carl Lafayette Lomax as follows:

Count 1--unlawful possession of a firearm by a felon previously convicted of a violent felony (voluntary manslaughter) (Pen. Code, § 12021.1, subd. (a));[1]

Count 2--unlawful possession of a firearm by a felon (§ 12021, subd. (a)(1);[2]

Count 3--unlawful possession of a loaded firearm by an active member of a criminal street gang (§ 12031, subd. (a)(2)(C)); and

Count 4--unlawful carrying of a loaded firearm, not registered to him, in a public place or street (§ 12031, subd. (a)(2)(F)).[3]

As to all four counts, the district attorney specially alleged defendant had sustained two felony convictions (§ 667, subds. (a)-(e)). As to count 3, the district attorney alleged defendant's two prior convictions were for serious felonies (§ 667, subd. (a)).

That same day, defendant pleaded not guilty to the substantive counts and denied the truth of the special allegations.

On August 8, 2008, defendant filed a motion to set aside the information (§ 995). On August 15, 2008, the People filed written opposition. On August 18, 2008, the court granted the motion as to count 3 only.

On October 31, 2008, defendant rejected an offer of six years in state prison even though his maximum exposure was 50 years to life.

On November 13, 2008, the court dismissed count 4 on motion of the district attorney.

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[1] Further statutory references are to the Penal Code unless otherwise noted.

[2] The abstract of judgment mistakenly indicates that count 2 charged a violation of section 12021.1. Our holding in issue IV below resolves this error.

[3] The district attorney alleged a fifth count against a codefendant who is not a party to the instant appeal.

On November 18, 2008, after impanelment of the jury and commencement of testimony, the court declared a mistrial as to counts 1 and 2 due to delayed discovery.

On December 23, 2008, the court denied defendant's motion to dismiss the case and reset the matter for a readiness conference.

On December 30, 2008, defendant rejected plea offers from the court and the prosecution. On January 9, 2009, a new jury was impaneled to retry the case.

On January 15, 2009, the jury found defendant guilty of counts 1 and 2 and, after defendant's waiver of a jury trial, the court found the special allegations true as to counts 1 and 2.

On February 25, 2009, defendant filed a motion for new trial (§ 1181, subd. (5)) or for dismissal. On March 3, 2009, the prosecution filed written opposition to the motion.

On July 28, 2009, defendant filed a request to dismiss his strike priors.

On July 31, 2009, the court denied defendant's motion for new trial but granted his motion to strike his 1992[4] prior felony conviction "for purposes of *Romero*."

On July 31, 2009, the court denied defendant probation and sentenced him to the upper term of three years, doubled to six years pursuant to section 667, subdivision (e), on count 1. The court stayed a second six-year term on count 2 (§ 654) pending successful completion of the term imposed on count 1. The court awarded 560 days of custody credits. The court imposed a $200 restitution fine (§ 1202.4, subd. (b)) and imposed and suspended a second such fine pending successful completion of parole (§ 1202.45).

On the same date, the district attorney filed a notice of appeal from the judgment of sentence (§ 1238).

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[4] Although the court and the parties refer to defendant's "1992" prior felony conviction, the record indicates defendant committed the crime in 1992 and was convicted in 1993.

On August 13, 2009, respondent Lomax also filed a notice of appeal.

STATEMENT OF FACTS

The following facts of the substantive offenses are taken from the probation officer's report filed July 31, 2009:

> "On April 13, 2008, at approximately 11:45 p.m., officers were dispatched to Montclair Street regarding the report of shots fired. While en route, officers observed a vehicle traveling at a high rate of speed with its headlights off.
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> "A traffic enforcement stop was initiated. Upon contact, the passenger later identified as Carl Lomax, co-defendant, exited the vehicle and the officers observed blood on his shirt. At the time, the driver, Sherelle Abrams, co-defendant, was ordered to exit the vehicle. Upon exiting, the officer observed the muzzle of a firearm protruding from underneath the driver's seat. The co-defendants were detained, the vehicle was searched and the firearm was recovered.
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> "A record check was conducted and the officers were advised the firearm had been reported stolen. They were further informed that Lomax was on parole.
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> "During contact, Lomax was noted to have suffered a gunshot wound. Emergency personnel were requested, they responded to the scene and Lomax was transported to Kern Medical Center for treatment. While there, Lomax was questioned and he reported he was leaning inside the passenger side window when he heard footsteps approaching him. Lomax said an unknown subject mumbled something to him; therefore, he turned around and that was when he was shot. Lomax stated he fell to the ground and the subject ran southbound. Lomax stated he responded to Abrams' vehicle and requested to be transported to a hospital. Upon entering the vehicle, Lomax stated he saw a firearm lying in the center console and Abrams informed him that an unknown suspect threw the gun into her vehicle after he was shot. Lomax further stated that while en route to the hospital, he might have moved the firearm from the console and placed it underneath the driver's seat.
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> "During the course of the interview, the officer observed the tattoo 'Warlord Piru' on Lomax'[s] forearm. As a result, the officer questioned whether the shooting had been gang related and Lomax replied that he did not know why he was shot and he had no known enemies.

"……..

"Lomax and Abrams were arrested, transported to the Kern County Jail and booked into custody.

"The case against Abrams was dismissed on July 25, 2008."

I. THE TRIAL COURT ERRONEOUSLY DISMISSED ONE OF DEFENDANT'S "STRIKE" CONVICTIONS WITHOUT A STATEMENT OF REASONS IN THE MINUTES OF THE COURT

The People contend the order dismissing defendant's 1992 strike conviction for voluntary manslaughter must be reversed because the sentencing judge failed to enter his reasons in the minutes of the court.

A. Procedural History of the Section 1385 Request

On July 28, 2009, defendant filed a written request for the court to dismiss his prior strike convictions under section 1385. On July 29, 2009, the People filed written opposition to defendant's motion. On July 31, 2009, the trial court conducted a contested hearing on the motion and stated:

"Now, I'm not tickled with the situation. Mr. Lomax's past doesn't leave me a whole lot of room to exercise discretion, which has made this case somewhat difficult, especially in light of the fact -- and I will mention that there was a waiver of me and my indicated disposition at the time of readiness in this particular matter.

"I will note, however, that up until the offense in this particular case, from the time of his parole, his performance is absolutely stellar.

"Now, let's talk about the current offense in this particular case. He is charged and was convicted of being a felon in possession of a weapon.

"He was not charged with any charges relative to felony reckless discharge of a firearm. He was not at the time of trial charged with any gang enhancements or charges.

"He had two counts, a 12021.1(a) and a 12021(a)(1). He was simply charged with that.

"Now, I have taken judicial notice of this file. I have gone through and looked at the probable cause statement. I have looked at the findings of the Court at the time of the preliminary hearing.

"In light of the charges that were initially brought -- and what it gets down to in this particular case is that he went to trial on two charges of felon in possession of a firearm. And while there is a grave attempt to prove that he discharged this firearm, there is . . . at least a connection of the evidence in this particular case for that purpose, that's not what he's charged with. And there is a felony charge that could have connected him to that, and now I'm being asked to make a quantum leap and penalize him for having fired this weapon, and that's not what he's charged with. He is simply charged with possession. The PC statement charged him with felon in possession. It's what he was arrested for.

"I'm not condoning Mr. Lomax's conduct in any way, shape, or form in this circumstance. There is no question that he was at the scene of some kind of a shootout. He was wounded in this particular case. But I'm left with the circumstances of, again, what he's charged with and what is the appropriate penalty based upon his history as to what he's charged with.

"Evaluating everything, including his history since he's been on parole, the circumstances of this case, what he's done in the last three years, and what he is charged with, I do not think it warrants a sentence of 25 years to life.

"That does not mean I don't feel that a prison commitment of substantial nature is not appropriate in this particular case.

"I would indicate that no 667.5(b)'s were filed in this case, although one is apparently available.

"Because of that, I am limited to some extent that short of 25-to-life is the amount of time that I can give him.

"For that reason, the Court will strike the 1992 felony strike conviction; however, although I am striking it for purposes of Romero, I am going to use it to aggravate to upper term and will impose a term of six years."

The minute order for that proceeding simply stated with respect to the motion to strike: "MOTION TO STRIKE PRIOR CONVICTION IS GRANTED." On December 5, 2009, respondent's appellate counsel wrote the trial court "pursuant to the spirit of *People v. Fares* (1993) 16 Cal.App.4th 954, and the terms of *People v. Clavel* (2002) 103

Cal.App.4th 516." Counsel suggested that "the sentencing minute order contains an error which could be corrected with greater judicial economy at the superior court level rather than by appeal." After reviewing the procedural history of the case and the relevant law construing the requirements of section 1385, counsel requested the trial court "prepare, file and forward to the Court of Appeal an amended minute order reflecting the reasons given for its exercise of discretion in striking the prior strike allegations in the interests of justice." Counsel did not suggest the content of such an amended order and noted "[t]his request is merely for clarification and not modification of the earlier court order so that it is set forth not only in the reporter's transcript but [in] the minute order as well."

On December 17, 2009, approximately one month after the People filed their opening brief on appeal, the trial court filed the following minute order in response to a letter from defendant's appellate counsel:

> "COURT ORDERS PURSUANT TO PEOPLE VS. CLAVEL 103 CAL. APP. 4TH 516, THE COURT STRIKES ONE STRIKE BASED UPON EVALUATING EVER[Y]THING, INCLUDING THE DEFENDANT'S HISTORY SINCE HE'S BEEN ON PAROLE, THE CIRCUMSTANCES OF THIS CASE, WHAT THE DEFENDANT HAS DONE IN THE LAST THREE YEARS, AND WHAT THE DEFENDANT IS CHARGED WITH, THE COURT DOES NOT THINK IT WARRANTS A SENTENCE OF 25 YEARS TO LIFE."

B. <u>Relevant Law</u>

Section 1385, subdivision (a) states:

> "The judge or magistrate may, either of his or her own motion or upon application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading."

The discretion conferred by section 1385 upon the trial courts includes the discretion to dismiss or strike an enhancement in the furtherance of justice. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.) A dismissal without a written

statement of reasons is invalid and of no effect, regardless of a reviewing court's belief that the reasons for dismissal can be discerned from other portions of the record. A reporter's transcript showing the trial court's motivation is not enough; the minutes must reflect the reasons. The purpose of the requirement is to allow review of the trial court's reasons for ordering dismissal. (*People v. Bonnetta* (2009) 46 Cal.4th 143, 148-151.)

The term "furtherance of justice" in section 1385 requires the trial court to consider both the constitutional rights of the defendant and the interests of society, represented by the People, in determining whether there should be a dismissal. The reason for dismissal must be that which would motivate a reasonable judge. Courts have recognized that society has a legitimate interest in the fair prosecution of crimes properly alleged. A dismissal that arbitrarily cuts those rights without a showing of detriment to the defendant constitutes an abuse of discretion. (*People v. Superior Court (Pipkin)* (1997) 59 Cal.App.4th 1470, 1477-1478.)

In 1970, the Supreme Court construed section 1385 in the following manner:

> "It is settled law that this provision is mandatory and not merely directory. Recently in *People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 502-503, while recognizing the broad right of a trial judge to dismiss in furtherance of justice, we adverted to the requirement that he 'must state his reasons in the minutes' and took pains to point out that '[i]f the reasons are not set forth in the minutes, the order dismissing may not be considered a dismissal under section 1385. [Citations.]' (*Id.* at p. 503, fn. 7.)
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> "Thus, it has been said: 'The statement of reasons is not merely directory, and neither trial nor appellate courts have authority to disregard the requirement. It is not enough that on review the reporter's transcript may show the trial court's motivation; the *minutes* must reflect the reason "so that all may know why this great power was exercised."' (*People v. Beasley, supra,* 5 Cal.App.3d 617, 637.) The underlying purpose of this statutory requirement is 'to protect the public interest against improper or corrupt [fn. omitted] dismissals' and to impose a purposeful restraint upon the exercise of judicial power '"lest magistral discretion sweep away the government of laws."' (*People v. Superior Court (Schomer)* (1970) 13

Cal.App.3d 672, 678, quoting from *People v. Winters* (1959) 171 Cal.App.2d Supp. 876, 882.)" (*People v. Orin* (1975) 13 Cal.3d 937, 944.)

In 1989, this court observed:

> "Section 1385 requires the reasons for dismissal be set forth in the minutes. Oral statements are not the same as court minutes. Minutes and oral pronouncements of the court, even if they are reduced to writing by the reporter, are different things. If the reasons are not set forth in the minutes, the order dismissing may not be considered a dismissal under section 1385. If valid reasons are expressed in the reporter's transcript but do not appear in the minutes, the mandatory requirements have not been met. (*People v. Andrade* (1978) 86 Cal.App.3d 963, 974-975.) Moreover, a specification of reasons is insufficient when it is couched in conclusionary language and fails to set out the factual basis for the conclusions reached. (*People v. McAlonan* (1972) 22 Cal.App.3d 982, 986.) Failure to state the reasons in the minutes renders a dismissal under section 1385 invalid. (*People v. Orin* (1975) 13 Cal.3d 937, 943.)" (*People v. Superior Court (Flores)* (1989) 214 Cal.App.3d 127, 135-136.)

In 2004, Division Eight of the Second Appellate District elaborated on our holding in *Flores*, stating:

> "The main purpose of this requirement [statement of reasons in an order upon the minutes] is to restrain judicial discretion and curb arbitrary action for undisclosed motives and reasons. The written specification allows us to determine whether the trial court's stated reasons justified its exercise of discretion. As a result, our review is limited to the reasons stated by the trial court. (*People v. Bracey* (1994) 21 Cal.App.4th 1532, 1541-1542.)" (*People v. Thorbourn* (2004) 121 Cal.App.4th 1083, 1088.)

In 2008, this court reaffirmed the principles cited in *Flores*:

> "[N]othing in the trial court's ruling suggests it was, in fact, exercising its authority under, and specifically basing its order upon the authority contained in, section 1385. (*Andrade, supra,* at p. 974.) Additionally, there is nothing before us to show that, as required by the statute, the reasons for dismissal have been set forth in the minutes. (*Ibid.*) 'Requirement of a statement of reasons for dismissal pursuant to section 1385 is mandatory, not directory [citation], and in the absence of such statement "the order may not be considered a dismissal under section 1385." [Citation.]' (*People v. Hunt* (1977) 19 Cal.3d 888, 897.) 'If valid reasons are expressed in the reporter's transcript but do not appear in the minutes, the mandatory

requirements have not been met. [Citation.]' (*People v. Superior Court (Flores)* (1989) 214 Cal.App.3d 127, 135-136.)." (*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 54.)

One year ago, the Supreme Court carefully re-examined the statement-of-reasons requirement of section 1385 in *People v. Bonnetta* (2009) 46 Cal.4th 143 (*Bonnetta*). With a single dissenting vote, the court observed:

> "A century of judicial decision, looking to the Legislature's intent in enacting Penal Code section 1385, has construed its provisions to be 'mandatory,' so that an order of dismissal is ineffective in the absence of a written statement of reasons entered upon the minutes. Despite the multitude of decisions adopting this construction, defendants contend section 1385 actually means something else. They invite us to adopt an interpretation that will preserve an order of dismissal entered without a written statement of reasons entered upon the minutes if the appellate court is able to discern the trial court's reasoning from some other portion of the record. Defendants' construction has some appeal, particularly where, as here, the trial court's reasons unambiguously appear in the transcript of the oral proceedings. Nonetheless, that the settled meaning of section 1385 in some instances renders compliance with its mandate inefficient does not justify the conclusion that the Legislature that enacted it intended something different, particularly when valid reasons existed and continue to exist for the long-standing interpretation." (*Bonnetta, supra,* 46 Cal.4th at p. 146.)

The Supreme Court went on to state:

> "Having concluded Penal Code section 1385 states a mandatory requirement, we have no reason to consider whether a violation of its provisions might be deemed harmless. Nonetheless, in response to the argument that there is no logical reason to hold invalid a dismissal if the trial court had discretion to grant it, we find it useful again to note that the purpose of the requirement is to allow review of the trial court's reasons for ordering dismissal.… Of course there is little reason to fear that a trial court's abuse of discretion will go undetected when, as here, the reasons for a dismissal are clearly stated during the oral proceedings and have become a part of the reporter's transcript. However, experience suggests the more common practice is for the court and counsel to engage in a wide-ranging discussion, before the court, without clearly identifying the points it found persuasive, states its decision. And although a rule might be stated that would allow the reviewing court to uphold the trial court's order if, but only

> if, it finds the trial court's reasons to be clearly articulated, or if any and all of the reasons mentioned would justify dismissal, such a rule, while reducing the trial court's burden, would increase that of the appellate courts without eliminating the possibility the reviewing court would misidentify the specific reason or reasons for the trial court's ruling." (*Bonnetta, supra,* 46 Cal.4th at pp. 151-152.)

C. Application of Law to the Instant Case

1. Timeliness of Minute Order

In the instant case, the trial court did not contemporaneously set forth the reasons for dismissal in an order entered upon the minutes. (§ 1385, subd. (a).) Rather, the court ordered dismissal of defendant's strike prior on July 31, 2009, and then entered reasons for dismissal on the minutes of the court some four and one-half months later, on December 17, 2009. The latter order occurred approximately one month after the People filed their opening brief on appeal and at the behest of defendant's appellate counsel, who brought the matter to the trial court's attention via a letter. Defendant maintains "the defense submitted a letter to the trial judge pursuant to *People v. Clavel* (2002) 103 Cal.App.4th 516, requesting that the court prepare an amended minute order setting forth the reasons for striking the strike in the minute order. No objection was filed by [the People]."

In *People v. Clavel, supra,*103 Cal.App.4th 516 (*Clavel*), the People moved for an order dismissing a criminal defendant's appeal on the ground the defendant asserted a miscalculation of presentence custody credits but failed to first pursue his remedy in the trial court, as required by section 1237.1. The defendant did not file a formal motion with the trial court before commencing his appeal. He did send a letter to the trial court requesting an amendment of the abstract of judgment due to alleged errors in the calculation of presentence custody credits. The defendant maintained he relied upon the letter format suggested by *People v. Fares* (1993) 16 Cal.App.4th 954, 958. Both section 1237.1 and *Fares* itself explicitly required that a formal motion be filed in the trial court.

Once the matter is before the reviewing court on appeal, the record must show that the defendant first filed a motion in the trial court raising the issue and requesting relief. The record in the *Clavel* appeal did not contain a motion to amend the abstract of judgment to correct the alleged miscalculation of credits or a trial court ruling on such a motion. Division Two of the First Appellate District dismissed the defendant's appeal, noting he was still free to file a motion in the trial court requesting relief. (*Clavel*, *supra*, at pp. 518-519.)

The People's reply brief does not expressly challenge the timeliness of the trial court's December 17, 2009, recitation of reasons for dismissing the prior strike conviction. In fact, the People acknowledge in their reply brief: "Though the amended minute order may answer the People's procedural argument [in the opening brief] concerning the lack of reasons stated in the minutes, that order in no way refutes the People's principal contention that the dismissal in this case was an abuse of discretion."

The acknowledgment in appellant's reply brief sounds very much like a concession. Nevertheless, at oral argument, Deputy Attorney General Rouzan, the counsel for appellant, observed that the Supreme Court had been holding "hard and fast" to the strict requirements of section 1385. The Supreme Court has held the "[r]equirement of a statement of reasons for dismissal pursuant to section 1385 is mandatory, not directory [citation], and in the absence of such statement 'the order may not be considered a dismissal under section 1385.' [Citation.]" (*People v. Hunt* (1977) 19 Cal.3d 888, 897.) In our view, a postsentencing recitation of reasons essentially circumvents the orderly arrangement envisioned by the Legislature in enacting section 1385.[5] The untimely issuance of a new minute order after commencement of this appeal

[5] Government Code section 69844 states in relevant part:

> "The clerk of the superior court shall keep the minutes … of the court, entering at length within the time specified by law, or forthwith if no time

does not satisfy the requirements of section 1385, subdivision (a) as envisioned by the Supreme Court in *Bonnetta*.

2. <u>Content of the Statement of Reasons</u>

Apart from the issue of timeliness of the December 17, 2009, minute order, one might question the procedural adequacy of the statement of reasons in light of existing California case law. At oral argument, Deputy Attorney General Rouzan maintained the statement of reasons in the December 17, 2009, minute order was inadequate because it listed categories of relevant circumstances rather than the precise circumstances that take respondent outside the Three Strikes law. At that same time, Deputy Attorney General Rouzan frankly acknowledged the factors cited by the trial court in the reporter's transcript would have been specific enough had they appeared in the minute order.

The facts in this case involve an arguably adequate oral recitation of reasons for dismissal of a strike conviction that fails to meet the test of *Bonnetta* for written entry upon the minutes and a post-trial effort to rectify the oversight with a minute order whose contents we need not analyze for adequacy due to its untimeliness under section 1385.

> is specified, any order, judgment, and decree of the court which is required to be entered and showing the date when each entry is made. Failure so to enter the date or failure to enter the order, judgment, or decree within the time specified in this section shall not affect the validity or effectiveness of the entry."
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> Division One of the Second Appellate District observed many years ago:
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> "It is axiomatic that every court has the inherent right and power to cause the record to correctly set forth the court's acts and proceedings. It is true, of course, that in exercising this power the court is not warranted in doing more than making its records conform to the actual facts, and cannot, under the guise of utilizing this power, correct a judicial error, for such an error can be remedied only by appeal from the judgment." (*Peebler v. Olds* (1942) 56 Cal.App.2d 13, 16.)

The People devote a substantial portion of their brief to a detailed discussion of the trial court's exercise of discretion under section 1385. The reporter's transcript of the section 1385 hearing sets forth the trial judge's analysis in substantial detail. The requirement of a minute order setting forth reasons for a section 1385 dismissal might seem superfluous to some, particularly where a trial judge has set forth his or her reasoning in detail in the stenographic record of the superior court's proceedings. Nevertheless, the Supreme Court of California has held the minute order requirement of section 1385 to be mandatory and we must follow its direction. (*Bonnetta, supra,* 46 Cal.4th at pp. 149, 151 ["A dismissal without a written statement of reasons is invalid and of no effect regardless of the reviewing court's belief that the reasons for the dismissal can be discerned from other portions of the record."].)[6]

In these circumstances, the Supreme Court has outlined the appropriate procedure to be followed:

> "[A]s the trial court's order of dismissal is ineffective, the matter must be remanded at least for the purpose of allowing the trial court to correct the defect by setting forth its reasons in a written order entered upon the minutes. Alternatively, on remand the trial court may, but need not, revisit its earlier decision, as on reflection it might determine its reasoning was flawed or incomplete. Judicial economy is furthered by allowing the trial court to correct what, upon reconsideration and reflection, it perceives to

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6 In *People v. Peinado* (1976) 67 Cal.App.3d Supp. 1, 9, defendant was charged in a misdemeanor prosecution arising from separate arrests for using and being under the influence of narcotics. The Los Angeles Municipal Court entered a July 10, 1975, docket entry which read: "People have not complied with discovery. Defendant's motion to dismiss granted. Defendant ordered released." The Appellate Department of the Los Angeles County Superior Court held the "cryptic notation" in the docket was sufficient under section 1385. The court summarily held "[n]o further detail was required to give notice to a reviewing court that dismissal was ordered because of the failure to comply with the court's discovery order." (*Ibid.*) In *Peinado*, the dismissal and docket entry occurred the same day. In the instant case, the minute order was filed four and one-half months after the dismissal.

> have been an unwarranted dismissal, or to consider if a dismissal should be ordered for some new or different reason. In such cases, the court must also have the power to take action such as reconvening the sentencing hearing …." (*Bonnetta*, *supra*, 46 Cal.4th at p. 153.)

The matter should be remanded to the trial court with directions to set forth its reasons for dismissal in a written order upon the minutes pursuant to section 1385. Upon remand, the trial court may revisit its earlier decision if, upon reflection, it determines its reasoning was flawed or incomplete. To that end, the trial court may reconsider whether the exercise of discretion under section 1385 resulted in an unwarranted dismissal or whether dismissal should have been ordered for the same or some new or different reason.

3. Exercise of Discretion

A criminal defendant's request that a court strike one or more strike convictions pursuant to section 1385 is commonly called a *Romero* motion. (See *People v. Superior Court (Romero)* (1996) 13 Cal.3d 497 (*Romero*).) That statute provides, in relevant part: "The judge or magistrate may … in furtherance of justice, order an action to be dismissed." (§ 1385, subd. (a).) Section 1385 gives the trial court discretion to strike allegations that would enhance punishment in the furtherance of justice. (*People v. Neild* (2002) 99 Cal.App.4th 1223, 1225.) "Discretion" is the power to make the decision, one way or another. (*People v. Myers* (1999) 69 Cal.App.4th 305, 309.) In *Romero*, the California Supreme Court concluded that section 1385, subdivision (a) "permit[s] a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law." (*Romero* at pp. 529-530.) And although "[a] defendant has no right to make a motion, and the trial court has no obligation to make a ruling, under section 1385," a defendant "[has] the right to 'invite the court to exercise its power by an application to strike a count or allegation of an accusatory pleading ....'" (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*).)

A trial court's decision to strike or not strike a previous serious or violent felony is reviewed under a deferential abuse of discretion standard. (*Carmony, supra,* 33 Cal.4th at p. 374.) We do not substitute our judgment for that of the trial court. (*People v. Myers, supra,* 69 Cal.App.4th at p. 310.) "It is not enough to show that reasonable people might disagree about whether to strike one or more of [the defendant's] prior convictions." (*Ibid.*) A trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it. (*Id.* at p. 377.) "[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]." (*Id.* at p. 378.)

In *People v. Williams* (1998) 17 Cal.4th 148 (*Williams*), our Supreme Court summarized the "deferential" standard of review of a *Romero* ruling for abuse of discretion as "whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*Williams, supra,* at p. 162.) On appeal, "'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

In the instant case, both parties acknowledge the existence of the December 17, 2009, minute order and invite this court to review the superior court's exercise of discretion on July 31, 2009, as set forth in the reporter's transcript. That transcript reflects the following: (1) the trial court evaluated "everything in this particular case on multiple occasions"; (2) the court evaluated the history of the respondent and the dates of

his offenses; (3) respondent was on parole when he committed offenses in 1992 and 1998, although he sustained no convictions during the three-year period between the parole date and the 1998 offense; (4) respondent's past conduct did not leave the trial court "a whole lot of room to exercise discretion"; (5) the court considered respondent's performance "absolutely stellar" from the time of parole to the time of the offense underlying the instant case; (6) respondent was not charged with any offenses relating to felony reckless discharge of firearm nor was he charged with any gang offenses or enhancements; (6) respondent was arrested and charged with being a felon in possession of a firearm although "he was at the scene of some kind of a shootout; and (7) under the circumstances of the case, the court did not think the matter warranted a sentence of 25 years to life.

Despite this thoughtful recitation of factors by the trial court, there is a difference between minutes of the court and oral pronouncement for purposes of section 1385. Thus, even if valid reasons are expressed in the record, for example, in the reporter's transcript, the mandatory requirements have not been met if those reasons do not appear in the minutes. "Arguably it would not be unreasonable to look at the record to find out what was said and perhaps to deem the entire record included in the minutes. But we believe it would be inappropriate to do so in a case involving dismissal; and we will not do so here. A dismissal is a drastic and inexorable remedy. [Citations.]" (*People v. Andrade, supra,* 86 Cal.App.3d at pp. 974-975.)

Under principles of stare decisis we are bound to follow the Supreme Court's holding in *Bonnetta,* that an order of dismissal is ineffective in the absence of a written statement of reasons entered upon the minutes. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

4. The Future of Section 1385

The Judicial Council Criminal Law Advisory Committee recently proposed an amendment to section 1385[7] (Item No. LEG 10-01) "to require trial courts to set forth the reasons for dismissal on the record or, if requested by any party, in an order entered upon the minutes." The Advisory Committee notes the proposed amendment would satisfy the underlying purposes of the current mandatory requirement (judicial accountability and facilitation of appellate review) while relieving trial courts of an unnecessary mandate (setting forth reasons in an order entered upon the minutes even when there is a court reporter's transcript of the proceeding which satisfies the spirit of the requirement). (See: http://www.courtinfo.ca.gov/invitationstocomment/documents/leg10-01.pdf.)

The Advisory Committee's proposal would preserve existing statutory rights while creating a more flexible alternative that frees burdened trial courts from the "double duty" of summarizing reasons for dismissal on the record and then reducing those same reasons to writing "in an order entered upon the minutes." We recognize, of course, "[i]t is the purpose, right and duty of the legislative branch of the government to enact such legislation as it deems desirable and its limitations are natural law and the written Constitutions; the courts have no voice in the policy nor in the wisdom of legislative action …." (*In re Lasswell* (1934) 1 Cal.App.2d 183, 188-189, disapproved on another point in *State Board v. Thrift D-Lux Cleaners* (1953) 40 Cal.2d 436, 446.)

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[7] Section 1385, if amended according to the recommendation of the Advisory Committee, would read in pertinent part:

> "(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth on the record or, if requested by any party, in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading."

Pending legislative action, we are bound by *Bonnetta,* and the matter must be remanded to the superior court with instructions to set forth its reasons in a written order entered upon the minutes. (*Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d at p. 455.) In the alternative, the trial court may, but need not, revisit its earlier decision pursuant to *Bonnetta, supra,* 46 Cal.4th 143.

II. THE TRIAL COURT PROPERLY DENIED A NEW TRIAL MOTION BASED ON PROSECUTORIAL MISCONDUCT

Prosecutorial Misconduct

Defendant contends the trial court committed reversible error by denying his motion for a new trial based upon prosecutorial misconduct.

The prosecutor stated during closing argument:

> "I think the thing that -- ladies and gentlemen, Officer Gregory and Dean Barthelmes are good cops. Okay. They weren't lying to you. They weren't trying to sell you something. They weren't trying to tell you a story. Okay. They told you the way it happened. And despite how many different ways Mr. Revelo [defense counsel] tried to ask his question, the answers were the same. Okay. He tried to do, you know, a few times what we call impeachment, and that is when you bring a prior statement and, you know, you say to the officer, you know, 'Well, you're testifying to this now, but you testified to this later on.' That didn't actually happen, ladies and gentlemen.
>
> "There were a few prior hearings where Mr. Revelo's … question to the witness was different than their answer. But just because Mr. Revelo asks the question, just because he says something, just because he implies something in a question, doesn't make it the case. Doesn't make it so.
>
> "I think you know, for me I guess in every trial we have sort of a defining moment. And this one it would be when Mr. Revelo had Officer Gregory up on the stand and asked a question that implied something. 'You're lying today, aren't you?' and he looked at him and he said, 'I'm not lying to you, Mr. Revelo.'

> "That for me was kind of it. And I think that, you know, one of the … reasons for juries is that you decide the credibility of witnesses. Did you feel like you were being sold something? Did you feel like … is this a grand conspiracy to get this guy? Is that -- I mean, nothing better to do? We're … not interested in finding the right person, we're gonna find a reason to get this guy? I think that's what Mr. Revelo would like you to believe. But it's not what happened."

On February 25, 2009, defendant filed a motion for new trial (§ 1181) alleging the prosecutor had engaged in misconduct by vouching for his witnesses. Defendant argued the prosecutor personally vouched for the credibility of a witness by referring to one officer as a "good cop[]." In a supporting declaration, defendant's counsel asserted: "The prosecutor made several statements which were not supported by the evidence, and that the prosecutor should have known were grossly mistaken." Counsel did not specify the nature of the statements in his declaration. In written opposition filed March 3, 2009, the People observed: "During [defense counsel] Mr. Revelo's closing argument, indeed throughout the better part of the trial[,] Mr. Revelo launched a vigorous attack on the officer's performance and professionalism. Mr. Revelo's attack was in no way supported by the evidence. To the contrary, the evidence presented at trial suggested that the officers had thoroughly executed their duties and done so with integrity. The prosecutor's comment that these were, 'good cops,' was [in line] with the evidence and was an appropriate rebuttal to Mr. Revelo's invective."

On July 31, 2009, the trial court denied defendant's motion for new trial on the ground of prosecutorial misconduct, stating: "I do not believe [the prosecutor's comments] rise to the level of vouching for the veracity of the officers. He merely stated these are good cops; they have no motive to lie. Now, if that is considered vouching when the defense, loud enough to be heard one courtroom over, accuses the officers of lying, and this argument is made in closing response to that, I do not think that that is in the nature of vouching. Had he made that, perhaps maybe in the opening argument or some other time during the trial, I think it would have been a different situation. But as I

recall the nature of this trial, the defense counsel's almost complete focus of the defense in this case was the veracity of the officers. And in response to the closing argument of the defense, I do not feel that it rises to the level of vouching to the credibility."

On appeal, defendant contends the prosecutor improperly vouched for the credibility of Officers Gregory and Barthelmes and thereby engaged in prosecutorial misconduct. He further contends the trial court committed reversible error by denying his motion for a new trial on the basis of such misconduct.

The applicable federal and state standards regarding prosecutorial misconduct are well established. The intemperate behavior of a prosecutor violates the federal Constitution when it comprises a pattern of egregious conduct that infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

Prosecutorial misconduct requires reversal only if it prejudices the defendant. (*People v. Fields* (1983) 35 Cal.3d 329, 363.) Where it infringes upon the defendant's constitutional rights, reversal is required unless the reviewing court determines beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*People v. Harris* (1989) 47 Cal.3d 1047, 1083.) Prosecutorial misconduct that violates only state law is cause for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor refrained from the objectionable conduct. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

The issue of prosecutorial misconduct is forfeited on appeal if not preserved by timely objection and request for an admonition in the trial court. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000.) If an objection has not been made, the point is reviewable

only if an admonition would not have cured the harm caused by the misconduct (*id.* at pp. 1000-1001) or if an objection would have been futile (*People v. Hill* (1998) 17 Cal.4th 800, 820-821). Defense counsel did not interpose an objection to the prosecutor's statement at closing argument and did not request an admonition of the jury once the comments were uttered. Nothing in the record suggests such an objection or admonition would have been futile. Any claim of misconduct was forfeited, and the trial court did not err in denying the defense motion for new trial based upon prosecutorial misconduct. (*People v. Dykes* (2009) 46 Cal.4th 731, 760.)

Alleged Ineffective Assistance

Defendant nevertheless contends his trial counsel was ineffective by failing to interpose such an objection during the prosecutor's closing argument. The defendant has the burden of proving ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, the defendant must establish not only deficient performance, which is performance below an objective standard of reasonableness, but also prejudice. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Tactical errors are generally not deemed reversible. Counsel's decisionmaking is evaluated in the context of the available facts. To the extent the record fails to disclose why counsel acted or failed to act in the manner challenged, appellate courts will affirm the judgment unless counsel was asked for an explanation and failed to provide one or unless there simply could be no satisfactory explanation. Prejudice must be affirmatively proved. The record must affirmatively demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) "Reversals for ineffective assistance of counsel during closing argument rarely occur; when they do, it is due to an argument against the client which

concedes guilt, withdraws a crucial defense, or relies on an illegal defense." (*People v. Moore* (1988) 201 Cal.App.3d 51, 57.)

Generally, improper vouching for the strength of the prosecution's case involves an attempt to bolster a witness by reference to facts outside of the record. In California, it is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, depth of experience, or the prestige or reputation of their office. Moreover, prosecutors may not offer personal opinions based solely on their experiences or on other facts outside the record. Nevertheless, it is not misconduct to ask the jury to believe the prosecution's version of events as drawn from the evidence. (*People v. Huggins* (2006) 38 Cal.4th 175, 206-207.)

In the instant case, defense counsel argued that law enforcement officers had treated defendant badly at the time of the offense and then lied about that treatment during their trial testimony. The prosecutor responded in his closing argument by asserting the two officers, Barthelmes and Gregory, recounted the offense truthfully and consistently despite defense counsel's efforts to impeach them. The prosecutor reminded the jury that defense counsel had expressly accused Officer Gregory of lying on the stand and that Officer Gregory had expressly refuted the accusation. The prosecutor described the exchange as the "defining moment" of the trial and reminded the jurors that "you decide the credibility of witnesses."

The prosecutor's remarks were fair comment on the state of the evidence and a temperate response to defense counsel's vigorous argument. Defense counsel did not provide ineffective assistance by declining to interpose an objection to the prosecutor's remarks at closing argument in light of all of the facts and circumstances. The trial court did not err in denying the motion for new trial.

III. THE TRIAL COURT ERRONEOUSLY FAILED TO STAY THE $30 FEE UNDER GOVERNMENT CODE SECTION 70373 AND THE $20 FEE UNDER PENAL CODE SECTION 1465.8 AS TO COUNT 2

Defendant contends, and the People concede, the fees and assessments imposed on count 2 should have been stayed under section 654.

The People explain:

> "At sentencing, the trial court imposed, but stayed under Penal Code section 654, a six-year term for the defendant's second possession count…. The court imposed a court security fee and an assessment on that stayed count…. Defendant now asserts that the separate fees and assessments on the stayed court [*sic*] should also have been stayed…. Because various fines and associated penalties have been equated to punishment subject to section 654's provisions [citations omitted], the People must agree that section 654 would also apply to the financial penalties associated with the stayed count. Accordingly, the abstract of judgment should be amended to stay imposition of any financial as well as penal punishment associated with count 2." (Record citations omitted.)

IV. DEFENDANT WAS IMPROPERLY CONVICTED OF TWO COUNTS OF BEING A FELON IN POSSESSION OF A FIREARM BASED ON A SINGLE POSSESSION OF ONE FIREARM

Defendant contends, and the People concede, defendant was improperly convicted of two counts of being a felon in possession of a firearm based on a single possession of one firearm. He argues this court should vacate the judgment of conviction on count 2.

The People acknowledge:

> "Under the reasoning set forth in *People v. Ramon* (2009) 175 Cal.App.4th 843 [defendant could not be convicted of both Penal Code § 12031, subd. (a)(2)(C) and also § 12031, subd. (a)(2)(F), based on his possession of one gun on one occasion], the point is well taken.
>
> "As defendant Lomax suggests … it appears that he was charged with two counts of the firearm offense because his status as a felon was based on two prior convictions. Thus, defendant's case is like that in *People v. Coyle* (2009) 178 Cal.App.4th 209, where the court held that a defendant who killed a single person could be convicted of only one count of murder, rather than three, though that one murder was committed in a manner

> giving rise to three different special circumstances. (*Id.* at p. 210.) Similarly, defendant Lomax committed one act of possessing the handgun found in the vehicle. Accordingly, only one of those charges should be upheld." (Brackets in original.)

DISPOSITION

The judgment of conviction on count 1 is affirmed. The judgment of conviction and fees and assessments imposed on count 2 are vacated. The judgment of sentence is reversed and the matter remanded for further proceedings consistent with this opinion. In the event those sentencing proceedings entail a dismissal under section 1385, the trial court is directed to set forth its reasons for dismissal in "an order entered upon the minutes" pursuant to section 1385. The trial court is further directed to prepare an amended abstract of judgment and to transmit certified copies of the amended abstract to all appropriate parties and entities.

_____
POOCHIGIAN, J.

WE CONCUR:

_____
CORNELL, Acting P. J.

_____
DAWSON, J.